The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Vangard Industries, Inc.

File: B-222647

Date: September 8, 1986

DIGEST

1. Under request for quotations for brake shoes which called for the original equipment manufacturer's (OEM) part or an equivalent alternate part, contracting agency had a reasonable basis for requiring operational testing of an alternate part offered by the protester where problems had been experienced with other non-OEM parts; use of nonconforming parts could lead to serious safety hazards; and no operational tests had been performed previously on the protester's part.

2. Where protest is denied, protester is not entitled to recover the costs of filing the protest. Protester's argument--that despite denial of the protest, protester should be considered to have prevailed in its protest since contracting agency delayed placing purchase order under challenged request for quotations while the protest was pending--is without merit since in cases where agency agrees to grant the relief requested by the protester, recovery of costs is not allowed since there is no decision on the merits of the protest.

DECISION

Vangard Industries, Inc. protests the decision by the Defense Logistics Agency (DLA) to perform operational tests on the part offered by Vangard under request for quotations (RFQ) No. DLA700-86-Q-TD13 for brake shoes for aircraft towing tractors. Vangard contends that it is unreasonable for DLA to delay placing an order with Vangard under the RFQ until the tests on its product have been completed. We deny the protest.

The RFQ, issued on January 30, 1986, called for quotations on 1000 brake shoes for tractors used to tow aircraft. The brake shoes were identified by the original equipment manufacturer's (OEM) part number. The RFQ stated that offerors submitting quotations for alternate parts were required to provide evidence that the part offered was equivalent to the specified OEM part. Fifteen offerors responded to the RFQ. Vangard submitted the lowest quotation, offering an alternate part which Vangard stated had been approved as equivalent to the OEM part under a prior order for the brake shoes. DLA agrees that Vangard's part had been approved as an alternate source for the OEM part in connection with an order for the brake shoes in June 1985. According to DLA, the approval was based on a physical comparison of the dimensions of the Vangard part with a sample OEM part; no operational tests were conducted.

In March 1986, the Navy engineering support activity (ESA) with responsibility for the brake shoes requested that only the OEM part be acquired because the non-OEM parts in use had created a potential safety hazard. Specifically, the ESA stated that the using activity had received non-OEM brake shoes of incorrect dimensions which could lead to brake failures, causing injury to personnel and damage to the aircraft being towed. As a result, the ESA requested that all non-OEM brake shoes be removed from the supply system.

Based on the ESA report, DLA decided that the prior approval of Vangard's non-OEM part was no longer effective. In view of the ESA's statement that nonconforming brake shoes create a potentially serious safety hazard, DLA concluded that the brake shoes should be regarded as critical items. In accordance with its policy to obtain ESA approval of all critical items, DLA then requested operational testing of the Vangard part by the ESA. In its report on the protest, DLA stated that no order will be placed under the RFQ until the testing is completed, unless an urgent requirement for the brake shoes arises; to date, no order has been placed. In addition, if the Vangard part is approved, DLA states that the order will be placed with Vangard.

Vangard contends that DLA's decision to have operational tests performed on its part before placing an order is unreasonable because its part had been approved in connection with a prior acquisition. With regard to the ESA report of problems associated with non-OEM parts, Vangard argues that the problems noted by the ESA were due solely to non-OEM parts with incorrect dimensions. Since Vangard's part previously was found to have the correct dimensions, Vangard contends, there is no reason to believe its part would cause

the problems reported by the ESA, and, as a result, there was no reasonable basis on which to require testing of the Vangard part. We do not agree.

DLA's decision to require further testing of Vangard's part was based on the ESA report that problems were being experienced with non-OEM brake shoes which could cause serious safety hazards. When the ESA report brought the criticality of the brake shoes to its attention, DLA requested operational testing of the Vangard part in accordance with DLA's policy to obtain ESA approval of all parts having critical applications. Thus, regardless of the specific reason for the ESA's concern about the use of non-OEM parts, we believe it was reasonable for DLA to require operational testing of the Vangard part in light of the potential safety hazards due to nonconforming brake shoes in general (which Vangard does not dispute) and because no operational tests had ever been performed on the Vangard part. See Compressor Engineering Corp., B-206879, Oct. 29, 1982, 82-2 CPD ¶ 383. The fact that the ESA report was based on non-OEM parts with incorrect dimensions, a problem which Vangard's part apparently does not share, does not affect the reasonableness of DLA's decision to require testing based on DLA's general, and, in our view, reasonable policy of requiring operational testing of all items having critical applications. In addition, we see no evidence that Vangard has yet been prejudiced by the testing requirement since DLA states that it will purchase the brake shoes from Vangard if, as Vangard maintains, its part is found to be equivalent to the OEM part. We deny the protest.

Vangard requests that it be awarded the costs of filing the protest, including attorney's fees. Recovery of costs is allowable only where a protest is found to have merit. See Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1) (Supp. III 1985); Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1986). Vangard nevertheless argues that it is entitled to recover its protest costs even if we deny the protest because, had the protest not been filed, DLA would have placed an order with another offeror under the RFQ without waiting for the test results on Vangard's part. We disagree. Even in cases where the contracting agency agrees to grant the relief requested by the protester before we issue a decision on the protest,[1] we will not allow the recovery of costs, since our authority to do so is predicated on a decision on the merits by our Office. Monarch Painting Corp., B-220666.3, Apr. 23, 1986, 86-1 CPD ¶ 396.

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[1] Here, the agency clearly disagrees with Vangard's position.

Vangard also requests that it be awarded the costs of preparing its quotation in the event DLA does not place an order with Vangard. Since no order has yet been placed, Vangard's request for costs on this basis is premature.

The protest and claims are denied.

for Seymour Efros

Harry R. Van Cleve
General Counsel